80-1472

No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALICE V. HOUSTON,

Petitioner,

v.

BENTTREE, LTD., an Oklahoma corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February 1981

QUESTIONS PRESENTED FOR REVIEW

I. Whether a violation of the federal fair housing statutes is proved by a showing that a sales commission was denied to the black prospective buyer's real estate agent but was paid to the agent of a white purchaser, or by a showing of conduct by the defendant which delayed, hindered and discouraged petitioner during a period prior to the time the defendant was willing to sign a sales contract but while the property was advertised by a "For Sale" sign, was open to viewing by the public, and when units were being "informally reserved" for prospective buyers.

II. Whether a suit was timely under 42 U.S.C. §3610(d) where it was filed in U.S. District Court within 30 days after petitioner was notified that the Department of Housing and Urban Development (H.U.D.) was unable to obtain voluntary compliance, but more than 60 days after the filing of the administrative complaint with H.U.D.

PARTIES BELOW

Alice V. Houston, Plaintiff-Petitioner, and Benttree, Ltd., an Oklahoma corporation, Defendant-Respondent, as cited in the caption of the case in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court is unreported and is reprinted in Appendix at p. 6a. The opinion of the United States Court of Appeals for the Tenth Circuit is not yet reported and is reprinted in the Appendix at p. 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1980 (App. 24a). This petition for certiorari is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES AND REGULATIONS INVOLVED

1. The following sections of the United States Code are listed in the Appendix at pp. 28a et seq.

42 U.S.C. §1981
42 U.S.C. §1982
42 U.S.C. §3601
42 U.S.C. §3604
42 U.S.C. §3610
42 U.S.C. §3612

2. The Code of Federal Regulations, 24 C.F.R. §105.34 (1980) is in the Appendix at p. 39a.

STATEMENT OF THE CASE

Proceedings Below

This suit was filed in the United States District Court for the Western District of Oklahoma on June 6, 1978 by petitioner, Dr. Alice V. Houston, against Benttree, Ltd., a corporation, seeking damages, a declaratory judgment and injunctive relief for alleged racial discrimination in the sale of housing.[1/] The complaint invoked the jurisdiction of the district court under 28 U.S.C. §1343 and 42 U.S.C. §3612 to secure relief provided by 42 U.S.C. §§1981, 1982 and 3604. The district court dismissed the claim under the 1968 Fair Housing Act (42 U.S.C. §3601, et seq.) as untimely under §3612 because it was not filed within 180 days of the alleged act of discrimination (App. 1a). The complaint

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1/ The suit against an individual defendant, John Kilpatrick, President of Benttree, Ltd. was dismissed prior to trial without objection of the plaintiff.

alleged that plaintiff had filed a timely charge of discrimination with the Department of Housing and Urban Development and had received a notice of her right to sue from H.U.D. pursuant to §810 of the Act (42 U.S.C §3610) on or about May 12, 1978, which was less than 30 days prior to the filing of suit.[2/] Plaintiff's "Opposition to Motion to Dismiss" also relied on §3610, but the district court made no mention of the issue of timeliness under §3610 in its order of dismissal which was entered August 19, 1978 (App. 1a). The case proceeded to trial on plaintiff's §1981 and §1982 claims, and a two day non-jury trial was held February 26-27, 1979.

On March 16, 1979, the district court filed a Memorandum Opinion (App. 6a), holding that "the defendant did not refuse to sell to plaintiff on account of her race" (App. 15a). The court held that "plaintiff failed to prove that the units

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2/ The H.U.D. letter, which was attached to the Complaint, is reproduced in the Appendix at p. 26a. It specifically advised petitioner of her right to sue within 30 days. See 24 C.F.R. §105.34, quoted in Appendix at p. 39a.

were available for sale at the time her offer was made. This is fatal to plaintiff's right to relief" (App. 13a).

Plaintiff appealed to the U.S. Court of Appeals for the Tenth Circuit which affirmed the judgment of the district court on December 2, 1980 (App. 17a). The court held that the record demonstrated plaintiff's failure to prove several elements of a prima facie case, that the trial findings were supported by substantial evidence and that the correct legal standards were applied (App. 22a). The Tenth Circuit set forth the following as the elements of a prima facie case of housing discrimination under §§1981 and 1982 (App. 22a):

> "... that the owner placed the property on the open market for sale; that plaintiff was willing and able to buy the property on the terms specified by the owner; that plaintiff so advised the owner at the time the property was available for sale; that the owner refused to so sell the property to plaintiff; and that there is no apparent reason for the refusal of the defendant to sell the property to plaintiff other than plaintiff's race."

erred in dismissing the cause under the Fair Housing Act because of the affirmance of the finding of no discrimination (App. 23a).

Statement of Facts

The petitioner, Dr. Alice Vivian Houston moved to Oklahoma City in August 1977 to begin work as Director of the Curriculum Services Department of the City public school system (Tr. 62-63).[3/] Dr. Houston is a black woman with a Ph.D degree who earned more than $37,000 annually in 1977 (Tr. 62, 70). The respondent Benttree, Ltd. is an Oklahoma corporation managed by Chris Calhoun (Tr. 8). Benttree acquired about 20 partially completed condominium units in July 1977 (Tr. 318-319). The owners of Benttree, Ltd. and all of their employees and sales agents were white people, as were all of the eventual purchasers and residents of the Benttree comdominium units (Tr. 33, 51, 340). Benttree began showing units to the public during September 1977 (Tr. 351-352).

3/ Citations are to the original transcript pages.

On Sunday, September 25, 1977, Dr. Houston saw a sign advertising the Benttree condominium (Tr. 63). The sign, which had been painted in the middle of September, said "Benttree Condominiums", "For Sale", had a phone number, and indicated a beginning price of $38,640 (Tr. 25, 63, 73, 253-254, 293-294, 324-325, 349-350, 471). Dr. Houston asked her real estate agent, Mrs. Lillie Mae Tillman to make inquiries (Tr. 649). Mrs. Tillman called Benttree and reached Mrs. Carol Calhoun (Tr. 95, 448-449).[4/] Carol Calhoun, a sister-in-law of Mr. Chris Calhoun, worked for him as a bookkeeper receptionist (Tr. 432). She and other employees in Calhoun's office had been promised a two percent commission on any Benttree units they were able to sell (Tr. 433, 436, 327).

4/ The district court mistakenly wrote that Mrs. Tillman phoned Chris Calhoun (App. 7a). However the evidence is undisputed that it was Carol Calhoun who spoke with Mrs. Tillman on this occasion.

Mrs. Carol Calhoun testified that when she received the call from Mrs. Tillman she advised her that as they had not previously used realtors she would find out if she could meet her at Benttree, and that she got the approval of Mr. Chris Calhoun to show the property to Mrs. Tillman and her client (Tr. 44). Mrs. Calhoun made an appointment to meet Mrs. Tillman and Dr. Houston at Benttree on Monday, September 26th (Tr. 64, 95, 449).

When Dr. Houston and Mrs. Tillman arrived at Benttree there were a number of people showing and looking at the furnished model units (Tr. 96). Mrs. Tillman testified that the first thing Mrs. Calhoun said to her was "We only pay a three percent commission", and that she replied "that's fine. The commission is not important." (Tr. 98). Mrs. Calhoun showed them through the model units and told them about the development (Tr. 64). She advised them that there would be an "opening" of Benttree the following weekend (Tr. 78). When Dr. Houston asked to see a two-bedroom unit they were taken to an uncompleted unit (Tr. 65). When Dr. Houston expressed interest in the unit Mrs. Calhoun told her that

someone had already bought that unit (Tr. 65, 96). Mrs. Calhoun later testified that a unit was informally reserved for a client named Mr. Horowitz in September, and that he subsequently bought it (Tr. 439-442). Similarly, a unit had been reserved for Mrs. Calhoun and her husband, a brother of Chris Calhoun (Tr. 437). Dr. Houston asked to see an available unit and was shown another two-bedroom condominium (Tr. 65). Dr. Houston told Mrs. Calhoun that she would like to buy that condominium and Mrs. Calhoun indicated that she could have it (Tr. 65). Mrs. Tillman asked Mrs. Calhoun to give her the legal description, street address and unit number in order to write a contract (Tr. 96-97, 65). Mrs. Calhoun said that she could not give her that information since they did not allow anyone but their attorney, Mr. F. Smith Barnes, to write contracts. She promised them an appointment with Mr. Barnes the next evening at six p.m. (Tr. 97, 65). Before leaving Mrs. Tillman asked Mrs. Calhoun if there would be any problem because Dr. Houston was black, and Mrs. Calhoun replied, "No" (Tr. 453).

On the next morning, Tuesday, September 27th, Mrs. Calhoun told Mr. Chris Calhoun that the people she had seen the night before "were very interested in purchasing a unit" (Tr. 450) and that Dr. Houston was a black woman (Tr. 451, 405). Mrs. Calhoun said that this was unusual as Dr. Houston was the first black person to come to Benttree (Tr. 451, 405). Mrs. Tillman waited until 10 a.m. for Mrs. Calhoun to call and confirm the appointment (Tr. 97). She then phoned Mrs. Calhoun but could not reach her (Id.). Mrs. Tillman phoned repeatedly leaving a message (Id.). She also left a message for Chris Calhoun to call her (Id.). She continued to call repeatedly until Carol Calhoun finally returned the call (Id.). Mrs. Tillman testified that Mrs. Calhoun began the conversation by saying "Mrs. Tillman, I should not have shown you those apartments. We are not going to let other realtors show them, and I should not have let you show them, and -- besides, we do not pay a commission. We are not going to deal through other realtors" (Tr. 98). Mrs. Tillman replied that she did not require a commission and asked her to make the appointment

(Tr. 99). (A defense witness, Realtor Bob Fricke, who represented a white purchaser, was paid a 2% commission by Benttree (Tr. 172, 354)). Mrs. Calhoun called Mrs. Tillman again and stated that they could not have a six o'clock appointment but would not give a reason. Mrs. Tillman stated that she became very suspicious and said "If this is discrimination, which I think it is, you're going to be in some trouble, Carol" whereupon Mrs. Calhoun replied "Well, if it is discrimination, I won't be here tomorrow, because I'm not going to be in trouble" (Tr. 99).

The next day, Wednesday, September 28, 1977, Mrs. Tillman resumed calling Mrs. Calhoun seeking an appointment with Mr. F. Smith Barnes, the Benttree lawyer (Tr. 99). Mr. Calhoun testified that Carol Calhoun told him that "they were interested in purchasing, and they were insisting that, you know -- she did indicate that maybe Dr. Houston and Mrs. Tillman were being put off" so Mr. Calhoun told her to have them call the lawyer, F. Smith Barnes (Tr. 328). Finally Mrs. Calhoun advised Mrs. Tillman that they had an appointment with Mr. Barnes at 4 p.m. that day (Tr. 99).

Mr. Barnes the Benttree attorney testified that he invited Mrs. Tillman and Dr. Houston to his office because Mrs. Carol Calhoun was unable to satisfy Mrs. Tillman about the delay in a purchase by Dr. Houston (Tr. 206-207). Mr. Barnes stated that it was not his purpose to negotiate a contract but only to explain the delay, since it was his understanding that they were disturbed by the fact they thought they were getting "the runaround" (Tr. 241). Mr. Barnes stated that he was not the seller's representative for the purpose of negotiating a sale (Tr. 242). The meeting lasted about a half hour on the afternoon of September 28, and was attended by Mr. Barnes, an associate in his law firm named Mr. Horton, Mrs. Tillman and Dr. Houston (Tr. 207). Mr. Barnes' account of the meeting (Tr. 206-210, 233, 241-242, 258-264) is consistent with the accounts by Mrs. Tillman (Tr. 100-102, 116-117), and Dr. Houston (Tr. 66-67, 70, 76). Mr. Barnes stated that Mrs. Tillman indicated that Dr. Houston wished to purchase one of the Benttree units and couldn't understand why they couldn't purchase it (Tr. 207-208). Mrs. Barnes explained that there

was a delay, that they were not selling options, and that he did not have a purchase contract prepared (Tr. 208). Mrs. Tillman asserted that other people had already signed contracts and were living at Benttree, but Mr. Barnes informed them that this was untrue (Tr. 208-209). Mr. Barnes acknowledged that he became angry because Mrs. Tillman was saying that he was either incompetent or a liar and he objected to her remarks (Tr. 261). Mr. Barnes said that he attempted to assure them that no one was living there, that his client had not signed contracts with anyone and that there wasn't any problem with Dr. Houston ultimately buying the unit she wanted (Tr. 209). He said that Dr. Houston wanted to see another type unit, and that when Chris Calhoun phoned while she was in his office Barnes arranged for Calhoun to wait at the site to show them another unit (Tr. 209).

Mr. Barnes did not testify that he ever told Mrs. Tillman or Dr. Houston when the contract would be available or could be signed. He told them that he was not going to use an option contract but rather wanted a contract which would

be binding on both parties (Tr. 233). Mr. Barnes testified that this plan was subsequently abandoned on Friday, September 30 when Mr. Chris Calhoun told him to prepare a contract for use at the opening scheduled for October 2 (Tr. 203). Within an hour Barnes then drafted an option contract using the Board of Realtors standard format and delivered it to Calhoun on Friday afternooon (Tr. 203, 235, 257).

Both Mrs. Tillman and Dr. Houston testified that Mr. Barnes never told them when a contract would be available (Tr. 76, 100, 115-116). Dr. Houston and Mrs. Tillman were aware of the scheduled opening on the following Sunday, October 2, but both denied that Mr. Barnes told them that contracts would be available at that time or any particular time (Tr. 78, 100, 472).

Dr. Houston and Mrs. Tillman proceeded from Barnes' office to Benttree where they were met by Mr. Chris Calhoun. The witnesses' accounts of the meeting are in conflict and the district court's finding about this occasion are brief and general. The findings about this meeting are quoted in full below (App. 9a):

"Plaintiff and Mrs. Tillman went to Benttree, and spoke to Chris Calhoun, who showed them the project and several units. Plaintiff found a small three bedroom she desired to purchase and so stated to Calhoun. He told her she would have to wait for the contracts which were being prepared. Plaintiff and Mrs. Tillman testified that Calhoun was openly antagonistic at this meeting and that he asked them to leave."

Dr. Houston's account of the meeting with Chris Calhoun was as follows:

"He received us and showed us, again, through the models. I asked him if I could see a small three-bedroom condominium. He carried me through two various condominiums, which were in various stages of preparedness, but he did not show me, in the beginning, a small three-bedroom -- three-bedroom as I had asked him to do.

"I asked him again to show me one. He again showed me some other kind, and then he eventually did show me a small three-bedroom condominium.

"I looked at it and told him I would like to buy this condominium, and I wanted him to sell it to me, and he said, 'Why should I? Why should I sell you this?' And I said, 'Because this is where I desire to live. This is what I want.'

"He told me, of course, 'No.' He asked if we had other places. 'Why this place?' Had we looked around on Hefner. Had we looked across the street and other places like that. I said, 'Yes, we have, but this is what I want to buy.'

"He again said, 'No.' Mr. Calhoun became terrifically upset, and I was somewhat amazed at this. I asked him if he would like for us to leave. He said, 'Yes,' he would, and then he changed and said, 'No,' he would not.

"We talked about the condominiums and the fact that I really wanted one, I was very much interested in buying one, but I did not get one.

"I then left with Mrs. Tillman and went back to my apartment." (Tr. 67-68).

Mrs. Tillman's corroborated Dr. Houston's account (Tr. 102-105). She stated that Mr. Calhoun was very rude "asked us why we didn't go someplace else" said "Why these condominiums", became upset, used some profane language, and said "Why -- why did this this have to happen to me?" several times (Tr. 103-105).

Mr. Calhoun's account of the meeting was quite different. He stated that when Dr. Houston asked whether she could buy the three bedroom

unit, he said "Yes", and told her that she could come back that weekend to enter into a formal contract (Tr. 331). He stated that he told Dr. Houston the price of the unit and that she stated that she wanted to buy (Tr. 374). He testified that he fully expected her to return on Sunday to buy the unit and that when she did not he concluded that she was no longer interested (Tr. 377). Dr. Houston testified that Mr. Calhoun's version of the encounter was untrue (Tr. 468-470).

Mr. Calhoun testified that on Thursday September 30, he spoke with Mr. Barnes and asked that he prepare Bentteee contract forms in time for the coming weekend (Tr. 322). Mr. Calhoun's testimony on direct examination by his attorney was as follows:

> A. Well, of course, I knew that -- that we were going to -- we decided to open on that weekend, and that the contract wasn't prepared. Smitty had his own pace. He was working on other things. He wanted to do it a different way than we ultimately did do it, and I talked to him several times, 'Smitty, the date's coming up.' You know.
>
> And then on Thursday, after I talked with Dr. Houston and, you know,

knew that we were going to open that weekend, I just called and said, 'Get her done, Smitty.'

Q. And he did do that after you directed him in those terms?

A. Yeah. (Tr. 322).

Mr. F. Smith Barnes stated that the call from Calhoun was on Friday, September 30, and that he then dictated the form contract within an hour and delivered it to Calhoun by mid-afternoon (Tr. 227).

Barnes never advised Mrs. Tillman of the change of plans and that a simple standard form option contract would be used (Tr. 233-234). The district court found that Barnes talked with Mrs. Tillman on both Thursday, September 29, and Friday, September 30 (App. 9a). On Thursday, September 29, and again on Friday, September 30, Mrs. Tillman phoned and spoke with Mr. Barnes asking him when the contracts would be available (Tr. 106). Mrs. Tillman described the conversations:

A. Yes. After this -- after this day, then of course I kept trying to get in touch with Mr. Barnes to get him to write the

> contract. In other words, Dr. Houston still wanted to buy one of those condominiums. And Mr. Barnes told me he did not have them ready, and I said, 'When are you going to have them ready?' And he said, 'Ms. Tillman, I have a lot of things to do besides write contracts.' And I said, 'I realize that, but can't you give us a time?'
>
> Now, this was on Friday. This was on -- I mean on Thursday. And on Friday I called him back and he said right then, he said, 'I do not have time to write contracts. I have other things to do.' And I said, 'Aren't you going to have contracts for tomorrow or Sunday?' And he did not answer me. And that's the last conversation I had with any of them, because I certainly wasn't going to push myself where I wasn't wanted" (Tr. 106).

Mr. Barnes acknowledged speaking with Mrs. Tillman on Thursday, September 29 and said that he told her "basically the same thing which I had in my conference with her" (Tr. 234). He at first did not recall, and then denied speaking with her on September 30 (Tr. 275). However, the district court found that Mrs. Tillman telephoned Barnes on both days to see if the contracts were ready and was told that they were not (App. 9a). The

district court also found that "Mr. Barnes completed the contracts on the afternoon of September 30" (App. 10a). When asked to explain why he never told Mrs. Tillman or Dr. Houston that the contracts were ready Mr. Barnes said that he expected them to come back on Sunday (Tr. 234, 276). Neither Mr. Barnes, Mr. Calhoun nor Mrs. Carol Calhoun made any effort to contact Mrs. Tillman or Dr. Houston and advise them that the contracts were available (Tr. 276, 376, 456). The district court's conclusion about this sequence of events was that "There is no requirement that defendant aggressively seek or pursue minority buyers" (Tr. 14a). Dr. Houston waited until October 6 for further contact from Benttree and then filed a complaint of racial discrimination with the Department of Housing and Urban Development (Tr. 84-86).

On Sunday, October 2, Mr. Sidney Musser, a white man, signed a contract to buy a Benttree condominium, and left an earnest money deposit with Mrs. Calhoun (Tr. 423-424). Mrs. Calhoun visited his home on two subsequent occasions and

obtained additional deposits (Tr. 424-425).[5/] Other purchasers obtained Benttree contracts on Sunday, October 2, but the first contracts which were actually consummated were signed October 8 (Tr. 322). The defendant put on evidence that Miss Karen Duncum, a white female, and her realtor Bob Fricke, had made numerous contacts with Mr. Calhoun and Mr. Barnes during September seeking to enter into a contract and had been told that contracts were unavailable. The district court found that "Ms. Duncum and her realtor were very persistent in their efforts to purchase a unit, but were unable to do so prior to October 2, for the same reason plaintiff was unable to purchase, i.e., the completion and availability of the prescribed contracts by Barnes" (App. 11a).

5/ Mr. Calhoun later took the position that Mr. Musser never had a contract (Tr. 314). Mr. Musser sought to purchase a unit in a later phase of the Benttree development. Some 14 months later Benttree returned his deposit and advised that Mr. Calhoun had never signed the contract.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ARTICULATE THE PROPER STANDARDS OF PROOF UNDER THE FAIR HOUSING LAWS IN ORDER TO VINDICATE AN IMPORTANT NATIONAL POLICY.

We are living in a divided nation.[6/] Today, more than twelve years after the enactment of the Fair Housing Act[7/] and this Court's decision in Jones v. Alfred Mayer Co., 392 U.S. 409 (1968), this Court has yet to decide a Title VIII case on

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6/ Cf. Report of the National Advisory Commission on Civil Disorders 1 (1968) ("Our nation is moving toward two societies, one black, one white -- separate and unequal.")

7/ 42 U.S.C. §§ 3601 et seq. (1968) ("Title VIII") (establishing the national policy of replacing "the ghettos with 'truly integrated and balanced living patterns'." Trafficante v. Metropolitan Life, 409 U.S. 205, 211 (1972) (quoting with approval remarks of Sen. Mondale, 144 Cong. Rec. 3422 (1968)).

its merits.[8/] Racial discrimination in housing remains extensive and residential racial segregation is pervasive and perhaps even more prevalent.[9/] Many minority households "do not yet have acceptable alternatives to overcrowded, excessively costly, and deteriorating housing in

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8/ The only Title VIII cases decided by this Court have dealt with procedural issues. See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Curtis v. Loether, 415 U.S. 189 (1974); and Trafficante v Metropolitan Life, supra note 7. This Court further has not considered a case of housing discrimination brought pursuant to the Civil Rights Act of 1866, 42 U.S.C. §1982 since Sullivan v. Little Hunting Park, 396 U.S. 229 (1969).

9/ Orfield, Federal Agencies and Urban Segregation: Steps Toward Coordinated Action, in Ford Foundation, Racial Segregation: Two Policy Views (1979); Wilson, Residential Consumption, Economic Opportunity, and Race (1979); Orfield, Must We Bus? (1978); Schnare, The Persistence of Racial Segregation in Housing (1978); Danielson, The Politics of Exclusion (1976); Falk & H. Franklin, Equal Housing Opportunity: the unfinished federal agenda (1976); Coleman, Cities, Suburbs, and States (1975); U.S. Commission on Civil Rights, The State of Civil Rights: 1979

racially or ethnically segregated neighborhoods."[10/] A recent study found that only 12% of whites and 14% of blacks in this country live in reasonably integrated neighborhoods.[11/] The U.S. Department of Housing and Urban Development has

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9/ continued

(January 1980); U.S. Commission on Civil Rights, The Federal Fair Housing Enforcement Effort (1979); U.S. Commission on Civil Rights, Twenty Years After Brown: Equal Opportunity in Housing (1975); Rubinowitz & Trosman, "Affirmative Action and the American Dream: Implementing Fair Housing Practices in Federal Homeownership Programs," 74 Nw. U.L. REV. 491 (1979); Schwemm," Discriminatory Effect and the Fair Housing Act," 54 N.D.L. 199 (1978); Note, "Applying the Title VII Prima Facie Case to Title VIII Litigation," 11 HARV. C.R. C.L.L. Rev. 128 (1976); and Taeuber, "Demographic Perspectives on Housing and School Segregation," 21 WAYNE L.REV. 833 (1975).

10/ U.S. Commission on Civil Rights (1980), supra note 9, at 13.

11/ A. Schnare, supra note 9, at 9 (1978) (assuming a "reasonably integrated neighborhood" to be 6% to 30% black, and basing findings on 1970 census data).

provided definitive evidence that blacks are discriminated against in the housing market in an extensive 1979 study which concluded that "[I]f a black were to visit four apartment complexes or four real estate firms [seeking to buy or rent], the probability of encountering discrimination would be 72 percent and 48 percent, respectively, for the rental and sale markets."[12/] Private sellers, builders, realtors, and financial institutions systematically discriminate against blacks by providing less information on housing opportunities, steering blacks toward black or minority neighborhoods, delaying, deceiving or intimidating prospective black purchasers, and by imposing unnecessary credit limits. Blacks also regularly pay more for comparable housing and live in lower

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12/ U.S. Department of Housing and Urban Development, Measuring Racial Discrimination in American Markets: The Housing Market Practices Survey, 200 (1979); see also, U.S. Department of Housing and Urban Development, Discrimination Against Chicanos in the Dallas Rental Housing Market: An Experimental Extension of the Housing Practices Survey (1979) (finding a 96 percent chance that a dark-skinned Mexican-American would experience discrimination when seeking a rental) (cited in U.S. Commission on Civil Rights (1980), supra, note 9, at 1-2).

quality dwellings at every income level.[13/] This rampant discrimination and segregation "has distorted patterns of urban growth, cut off minorities from access to growing suburban employment markets, subverted efforts to desegregate public schools and equalize the quality of public school education, and caused inequitable distribution of the burden of providing essential services to lower-income urban populations."[14/] The social costs are apparent in continuing racial divisions. This is the discrimination and segregation the Fair Housing Act was designed to destroy twelve years ago[15/] but very little has changed.[16/] The Chief Executive has noted that

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13/ A. Schnare, supra, note 9, at 16.

14/ U.S. Commission on Civil Rights (1975), supra, note 9, at 167.

15/ See S.1358, 90th Cong., 2nd Sess., 114 Cong. Rec. 2270 (1968); see also 114 Cong. Rec. 2273 (1968).

16/ A high degree of racial residential segregation was universal in 1968 as well. Taeuber, Negroes in Cities: Residential Segregation and Neighborhood Change (1965) (Creating a segregation "index of dissimilarity," with zero representing a

the Fair Housing Act is little more than "an empty promise." 17/

16/ continued

distribution of races in proportion to their numbers in the population as a whole and one hundred representing total segregation, Taeuber found a mean index of 86.2 for the 207 largest cities in the country, with only eight cities having indexes below 70. This index figure represents the percent of non-whites that would have to shift from one block to another to effect an even, unsegregated distribution, or zero index.) The latest Taeuber update is contained in Sorenson, Taeuber, and Hollingsworth, "Indexes of Racial Residential Segregation for 109 Cities in the United States, 1940 to 1970," 8 SOCIOLOGICAL FOCUS 125 (1975) (utilizing 1970 census data, Taeuber found that the 109 largest cities still had a mean index of 81.6, with only 13 cities below 70). At this rate Professor Thomas Pettigrew estimates desegregation will be achieved in about four or five centuries. Pettigrew, "A Sociological View of the Post-Bradley Era," 21 WAYNE L. REV. 813, 830 (1975).

17/ 125 Cong. Rec. §636 (daily ed. Jan. 23, 1979) (President Carter's 1979 State of the Union Message).

As stated above, this Court has never decided a Title VIII case on its merits. Trafficante[18] and Gladstone, Realtors[19] involved the significant but collateral issue of standing under the Fair Housing Act, but no appeals on the merits of a Title VIII case have been accepted by this Court.[20] As a result, a standard of proof necessary to show unlawful housing discrimination has never been authoritatively established. As demonstrated in Part II of this Petition, the standard adopted by the Court below is directly contrary to the standard adopted by other Circuits, and constitutes an open invitation to

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18/ Supra, note. 7.

19/ Supra, note 8.

20/ Curtis v. Loether, supra, note 8, held that parties were entitled to jury trials in damage suits brought pursuant to §812 of Title VIII, 42 U.S.C. §3612. Village of Arlington Heights v. Metropolitan Housing Development, 429 U.S. 252 (1977), involved a Fair Housing claim but that issue was remanded after the Court found no constitutional violation. See Metropolitan Housing Development v. Village of Arlington Heights, 558 F.2d 1283 (1977), cert. denied 434 U.S. 1025 (1978).

sellers to discriminate, during the pre-contract or negotiation stages of any prospective sale, against blacks and other minorities seeking housing. The confusion and uncertainty on the issue will not be resolved until a definitive decision is reached by this Court.

The state of housing discrimination law today then is very similar to the state of employment discrimination law in 1971 before this Court breathed life into Title VII by holding in Griggs v. Duke Power Co. that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in nature."[21/] Griggs, hailed as "the most important court decision in employment discrimination law,"[22/] opened up that field by providing the standard by which the legality of employment criteria would be measured. With that necessary foundation it became possible to build the parameters of the

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21/ 401 U.S. 424, 431 (1971).

22/ Schlei and Grossman, Employment Discrimination Law 5 (1979).

present doctrine in subsequent cases.[23] A decision by this Court defining the standard of proof necessary to show unlawful discrimination in housing would similarly serve as a foundation upon which the parameters of Title VIII could be built. Despite its wretched record of progress, Title VIII could be the useful weapon against discrimination and segregation that Congress intended it to be in 1968.[24] Congress intended the Act to

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23/ See e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); and McDonnell Douglas Corp v. Green, 411 U.S 792 (1973) (setting forth the basic order and allocation of proof in the individual disparate treatment case).

24/ See U.S. Commission on Civil Rights (1979), supra, note 9, at 233; U.S. Department of Housing and Urban Development, Measuring Racial Discrimination ..., supra, note 12, at ES-29; Schwemm, "Discriminatory Effect ...," supra, note 9, at 238. Even though Congressional focus on improving the Fair Housing Act over the course of the past year has centered almost entirely on enhancement of HUD's enforcement powers, even enchanced enforcement will be of limited value if hostile, fluctuating, or uncertain standards of proof exist in the appellate courts.

create a freedom from racial discrimination in housing and to reduce if not eliminate residential racial segregation.[25/] It is clear from the progress made since the 1960's in eliminating racial discrimination from such fields as education, voting rights, public accommodations, and employment that implementation of civil rights statutes can make a real difference in the lives of people long denied opportunity to achieve their full rights. And yet it is equally clear that the failure of the Fair Housing Act may be reaching a crisis point today as the high rate of inflation, the decline in housing production, and the energy crisis exacerbate the effect of discrimination in forcing minorities to continue to defer the American dream of a decent home and a decent neighborhood. This Court should resolve the conflict between the lower courts by delineating a standard of proof sufficient to insure that the existing statute can work to eliminate racial discrimination and segregation in this country.

25/ See supra note 15.

II. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS ON THE STANDARD OF PROOF OF RACIAL DISCRIMINATION UNDER THE FAIR HOUSING LAWS.

The courts below based their finding of no racial discrimination on an overly restrictive and erroneous legal standard which is at odds with Congressional intent, and with the interpretations of the fair housing laws by the majority of circuits which have considered similar questions. The standard adopted below led the courts to ignore acts of plain racial discrimination in the treatment of Dr. Houston which have been held unlawful in the other circuits.

First, it was undisputed, and the district court found that the defendants told Dr. Houston's real estate agent that Benttree would not pay her a commission (App. 8a). Mrs. Tillman was told that she would receive a three percent commission before the owner of Benttree learned that Dr. Houston was black (Tr. 98). After he learned this fact she was told that no fee would be paid

(Tr. 98, 451, 405). A realtor representing a white purchaser was in fact paid a commission by Benttree (Tr. 172, 354). This was plainly disparate treatment based upon race which would tend to discourage petitioner's realtor and thereby discourage petitioner from pursuing a purchase at Benttree. Such disparate treatment in and of itself violated the explicit prohibition in Title VIII against "discrimination ... in the terms, conditions, or privileges of sale or rental of a dwelling ...", 42 U.S.C. § 3604(b) and the proscription in Sections 1981 and 1982 against "all" discrimination in connection with the sale of property. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Such discouragement of a black homeseeker's agent and not a white applicant's cannot be brushed aside on the ground that it did not constitute an outright refusal to sell a unit to Dr. Houston for it can be just as effective in limiting a black purchaser's access to housing.[26/] Other courts of appeals have not

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26/ The fact that Mrs. Tillman was not immediately discouraged is irrelevant. See McDonald v. Verble, 622 F.2d 1227, 1233 (6th Cir. 1980); Smith v. Anchor Building Corp., 536 F.2d 231, 234 n.4 (8th Cir. 1976).

required as an element of proof that a defendant actually refuse to sell homes to plaintiffs before a violation of the fair housing laws is established. E.g., United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973), cert. denied, 416 U.S. 939 (1974) (Court of Appeals found defendants had never actually refused to sell houses to plaintiffs, but imposition of more onerous conditions on black persons violated fair housing laws); United States v. Youritan Construction Co., 370 F.Supp. 643, 648 (N.D. Cal. 1973), aff'd 509 F.2d 623 (9th Cir. 1975).

Second, the undisputed facts and the district court's findings demonstrate that plaintiff and her agent repeatedly attempted to buy a condominium unit for five consecutive days, and were met by tactics of discouragement and delay and a refusal to negotiate which were tantamount to a refusal to sell. The district court erred in holding this was a mere failure by the defendant "to aggressively seek or to pursue minority buyers" (App. 14a). In the context of the entire five days of contact between Dr. Houston and the three agents of Benttree, the petitioner's

conduct was entirely reasonable and the defendant's conduct so departed from the norms of business custom [27] and courtesies as to be explainable only as a refusal to sell on the basis of race. On September 29 and 30 Benttree's attorney told Mrs. Tillman that he did not know when the contract forms for Benttree purchases would be available and that he was too busy to write contracts (Tr. 106). He prepared the contract forms on the same September 30, and yet neither he, nor any other agent of Benttree made any effort to advise plaintiff or her agent of this development which plaintiff had sought to learn about for five consecutive days. All of the Benttree representatives explained their failure to contact Dr. Houston on the basis that they assumed she had lost interest, despite her repeated requests to buy a condominium. In the overall context of the case, including the all-white nature of the project, the court of appeals holding that plaintiff failed to prove even a

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27/ United States v. Pelzer Realty, supra.

prima facie case is an erroneous interpretation of the federal fair housing statutes.

All three of the persons with whom Mrs. Tillman and Dr. Houston dealt knew that the black homeseeker and her real estate agent believed they were being "put off," delayed (App. 9a, Tr. 328, 241, 208-209, 261). The owner of the condominiums, Chris Calhoun, and his lawyer, Smith Barnes, were well aware of and had discussed Mrs. Tillman's and Dr. Houston's daily efforts to purchase a unit (Tr. 209, 322). Yet, although the district court found that Barnes drafted the contract for sale on the same day that Mrs. Tillman last telephoned him (App. 9a, 10a), defendants made absolutely no effort to inform Dr. Houston or Mrs. Tillman that the contract was ready (App. 9a; Tr. 276, 376, 456). The district court dismissed these facts and stated "There is no requirement that defendant aggressively seek to pursue minority buyers" (App. 14a). The district court instead put the burden on Dr. Houston and Mrs. Tillman to ignore five consecutive days of persistent but fruitless efforts, to brush aside the humiliation and antagonism of prior meetings

and to beat down defendant's doors still further. The district court, and the Tenth Circuit in affirming, thus departed from those circuits which have explicitly held actions which discourage black homeseekers violate the fair housing laws. E.g., 5th Circuit, United States v. West Peachtree Tenth Corp., 437 F.2d 221 (1971) (action by an agent to discourage and impede applications to rent or buy violates Fair Housing Laws); 6th Circuit, Zuch v. Hussey, 394 F.Supp. at 1028, 1047 (E.D. Mich. 1975), aff'd, 547 F.2d 1168 (1977) ("[A]ny action by a real estate agent which in any way impedes, delays, or discourages on a racial basis a prospective home buyer from purchasing housing is unlawful."); 7th Circuit, Seaton v. Sky Realty Co., Inc., 491 F.2d 634, 636-38 (1974) (salesman showed home in a discouraging manner); 8th Circuit, Williams v. Matthews, 499 F.2d at 819, 826 cert. denied, 419 U.S. 1021, 1027 (1974) (". . . application procedures, and tactics of delay, hindrance and special treatment must receive short shrift from the courts."); 9th Circuit, United States v. Youritan Construction Co., 370 F.Supp. 643 (N.D. Cal.

1973), aff'd, 509 F.2d 623 (1975) (various forms of discouragement violate Fair Housing Laws); D.C. Circuit, Mayers v. Ridley, 465 F.2d 630, 652, 653 (1972) (activity is forbidden if "it has a discouraging psychological effect on purchasers . . ."). As stated by the Court of Appeals for the Fifth Circuit in United States v. Pelzer Realty, supra, 484 F.2d at 442, statements by defendants

> "[can] let the two [black] men know that they were not particularly welcome as customers . . . This attitude . . . certainly had an effect on the two men, and upon their willingness and ability to bargain.

Ignoring Dr. Houston's and Mrs. Tillman's frustration at receiving no answers and deeming defendant's failure to contact plaintiff when the contract was ready the same day she called, a mere failure to "aggressively seek or to pursue minority buyers" rewards actions which are successful in deterring black homeseekers.

This misapplication of the law is contrary to the ruling of Mr Justice Stevens in Wang v. Lake Maxinhall Estates, Inc., that discrimination is actionable under §§ 1981 and 1982

> If racial animus on the part of defendants played a part in frustrating plaintiffs' obvious desire to purchase. 531 F.2d 832, 835 (7th Cir. 1976).

Defendant's failure to make the one phone call which they knew would result in a sale was "inconsistent with ordinary business practices," United States v. Pelzer Realty, supra, 494 F.2d at 446, and should not have been dismissed by the district court's observation that "the Benttree project was inexpertly managed" (App. 14a). Defenses based on disorganized or arbitrary behavior have been rejected in other circuits. E.g., 8th Circuit, Smith v. Anchor Building Corp., supra, 536 F.2d at 235-36; see also, 9th Circuit, United States v. Youritan Construction Co., supra, 370 F.Supp. at 649-650 (arbitrary and uncontrolled rental procedures).

The district court refused to grant Dr. Houston relief in the face of these facts because it held

> Plaintiff failed to prove that the units were available for sale at the time her offer was made. This is fatal to plaintiff's right to relief. (App. 13a).

The district court set forth the legal standard pursuant to which it made this holding, as follows:

> The elements of plaintiff's proof to make out a prima facie case under 42 U.S.C. §§1981 and 1982 are (1) that the owner placed the property on the open market for sale, (2) that plaintiff was willing to purchase the property on the terms specified by the owner, (3) that plaintiff communicated this willingness to the owner at the time when the property was available for sale, (4) that the owner refused to sell the property to plaintiff on the terms which the owner indicated would otherwise be satisfactory, and (5) that there is no apparent reason for the refusal of the defendant to sell the property to plaintiff other than plaintiff's race. 28/

28/ The court of appeals below cited only two cases, Duckett v. Silberman, 568 F.2d 1020 (2d Cir. 1978) and Bush v. Kaim, 297 F.Supp. 151 (N.D. Ohio 1969). To the extent that Duckett v. Silberman followed the five elements of a prima facie case of housing discrimination set forth in Bush v. Kaim, it has not been followed in recent decisions by court of appeals in the same circuit. Williamsburg Fair Housing Comm. v. NYCHA, 492 F.Supp. 1225 (S.D.N.Y. 1980), aff'd, ___ F.2d ___ Civ. Act. No. 80-6161 (2d Cir. January 15, 1981); Robinson v. 12 Lofts Realty, 610 F.2d 1032, 1042 (2d Cir. 1979).

To premise protection of the fair housing laws on an owner's manipulation of the exact time at which a unit is put on or taken off the market directly and successfully frustrates the intent of these laws and creates a conflict with the liberal construction which should be accorded §§1981, 1982 and Title VIII. To hold that a prima facie case of discrimination under §§1981 and 1982 requires that the housing be "on the open market for sale" glorifies the technicalities of real estate transactions at the expense of the fundamental guarantees of equal housing opportunity and squarely conflicts with holdings by other courts of appeals. In Wang v. Lake Maxinhall Estates, Inc., supra, 531 F.2d at 834, Justice Stevens held that the fact that plaintiffs' offer to purchase had technically expired was irrelevant because:

> there is nothing in the record to suggest that they were no longer interested in purchasing the lot, that they gave any such indication to the broker, or that the broker asked them to extend their offer again.

The court of appeals in Moore v. Townsend, 525 F.2d 482, 485 (7th Cir. 1975) held the existence

of a contract irrelevant because "otherwise the very purpose of the Act [§ 1982] would be completely frustrated." Again, the Court of Appeals for the Seventh Circuit reversed a district court finding that:

> . . . the plaintiffs were not deprived of the right of buying a home because they owned a home . . . [that] had not been placed for sale and, hence, they were not in the market for a house.

because

> To adopt such a requirement [under § 1982 or § 3604] would encourage real estate agents to avoid selling to blacks, despite the clear Congressional mandate to the contrary. Jones v. Mayer, 392 U.S 409, 447-449 (concurring opinion of Justice Douglas).

Johnson v. Jerry Pals Real Estate, 485 F.2d 530, 531 (7th Cir. 1973). But see Madison v. Jeffers, 494 F.2d 114 (4th Cir. 1974).

The district court found, and the court of appeals noted, that although contracts were not available to be signed until September 30, or October 2, 1977, at least two units were reserved for particular buyers prior to that date, one for Mrs. Carol Calhoun and another for a Mr. Horowitz

(App. 11a and 12a). The court of appeals also noted that on the first day Dr. Houston visited the condominiums, she was told that a two-bedroom unit she expressed interest in purchasing had already been sold. (App. 19a). Both the court of appeals and the district court found these facts to have no legal significance because, in view of the fact that written sales contracts were not ready at that time, these reservations or sales could have been "informal" only (App. 11a-12a, 21a). In so ruling, the courts below ignored the crucial question under the fair housing laws, i.e., were black persons accorded the same rights, terms and conditions in the sale of real estate as were accorded white persons, and instead erroneously dismissed this discriminatory treatment because under state real estate law it might not have had binding significance.

Ironically, the district court and the court of appeals found these reservations irrelevant because the condominiums could not have been sold prior to September 30 or October 2 (App.

13a, 21a), yet totally failed to see the inconsistency between this holding and the finding that when plaintiff expressed an interest in purchasing a two bedroom unit on September 26, "defendant's sales agent told her that the one in which she was interested had already been sold" (App. 19a). Only two possibilities exist. If the unit could not have been sold before September 30 or October 2, as found by both courts below, then Dr. Houston was told that a unit was not available when, in fact, it was, in violation of the explicit prohibition in § 3604(d) of Title VIII that makes it unlawful "to represent to any person because of race [or] color . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." The only other possibility is that defendants considered the reservation of such condominiums tantamount to sale, in which case the units were, in fact, on the open market for sale, totally undermining the premise upon which the decisions below were based.

In any event, it was error to base a ruling on the view that plaintiff did not prove that she was willing to purchase the property on the terms specified by the owner (App. 15a), for the terms given to her were different than those given to at least two white purchasers. Unlike the Court of Appeals for the Tenth Circuit, courts of appeals in other circuits have refused to accept at face value terms or conditions, even if, unlike here, "they are objectively applied," where such terms are unnecessary to the seller's purpose or result in frustrating a black homeseeker's ability to obtain housing. Phiffer v. Proud Parrot, ___ F.2d ___ Prentice-Hall, Equal Opportunity in Housing ¶15,356 (9th Cir. November 24, 1980) (failure to place a security deposit); Williams v. Matthews, supra, (requirement that homes be sold only to approved builders).

Discrimination in housing today is more often than not "artfully cloaked," Haythe v. Decker, 468 F.2d 336 (7th Cir. 1972), for "clever men may easily conceal their motivations." United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), cert. denied, 422 U.S 1042 (1975).

To assure for black persons "the same right" to obtain housing as is enjoyed by white persons, a majority of courts of appeal have recognized:

> "[T]he statutes prohibit all forms of discrimination, sophisticated as well as simple-minded, and thus disparity of treatment between whites and blacks, application procedures, and tactics of delay, hindrance and special treatment must receive short shrift from the courts.

Williams v. Matthews, supra, 499 F.2d at 826. Thus, contrary to the holding of the district court and the court of appeals, the holdings in other circuits extend protection of the fair housing laws to cover all negotiations and sales efforts in connection with the sale or rental of housing. E.g., McDonald v. Verble, 622 F.2d 1227 (6th Cir. 1980). (§1982 and Title VIII prohibit both blatant and subtle discrimination in "sales efforts"); United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227-228 (5th Cir. 1971) (delay in processing application); United States v. Youritan Construction Co., supra (imposition of delaying tactics).

The Fair Housing Act of 1968, 42 U.S.C §3601, et seq. "was designed to provide, within constitutional limit, for fair housing throughout the United States." Zuch v. Hussey, 394 F.Supp. 1028, 1046 (E.D. Miss. 1975), aff'd 547 F.2d 1168 (6th Cir. 1977). Like its more recent counterpart, this Court has held that the Civil Rights Act of 1866, 42 U.S.C. §1982 applies to all racial discrimination in connection with the sale or rental of property. Jones v. Alfred H. Mayer, supra. In Jones, this Court found unambiguous the language of §1982 that all citizens shall have "the same right" as white citizens to obtain real property. Together with the Civil Rights Acts of 1870 and 1866, 42 U.S.C. §§1981 and 1982, the Fair Housing Act comprehensively spell out "The right of an individual to rent or purchase housing without suffering discrimination and to obtain federal enforcement of that fundamental guaranty." Jones v. Mayer, supra, 392 U.S. at 413 (§1982). See also, e.g., Runyon v. McCrary, 427 U.S 169 (§1981).

Consistent with the broad mandate of the fair housing laws, a majority of circuits have held that these acts must be liberally construed

to assure fulfillment of their policy objectives. E.g., Second Circuit, Robinson v. 12 Lofts Realty, supra (§1982, Title VIII); Third Circuit, Residents Advisory Board v. Rizzo, 564 F.2d 126 (1977) (Title VIII); Fifth Circuit, United States v. Mitchell, 580 F.2d 789 (1978) (Title VIII); United States v. Pelzer Realty, supra (Title VIII); Sixth Circuit, Zuch v. Hussey, supra (Title VIII); Seventh Circuit, Wang v. Lake Maxinhill Estates, Inc., supra (§§1981, 1982, Title VIII); Moore v. Townsend, supra (§§1981, 1982, Title VIII); Eighth Circuit, Smith v. Anchor Building Corp., 536 F.2d 231 (1976) (§§1981 1982, Title VIII) ; Williams v. Matthews, supra (§§1981, 1982, Title VIII); Ninth Circuit, Phiffer v. Proud Parrot, supra (§1982); United States v. Youritan Construction Co., supra; D.C. Circuit, Mayers v. Ridley, supra.

III. REVIEW SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE LOWER FEDERAL COURTS ON THE TIME LIMITATIONS FOR FILING SUITS UNDER 42 U.S.C. §3610, PARTICULARLY WHERE H.U.D. REGULATIONS AND ADVICE TO COMPLAINANTS CONFLICTS WITH THE TIME LIMITATIONS ADOPTED BY SOME COURTS.

We submit that a civil action under §810 of the Fair Housing Act of 1968 (42 U.S.C. §3610) is timely if commenced within thirty days after receipt of notice from the Secretary of Housing and Urban Development that voluntary compliance with the Act cannot be obtained. This suit was filed less than 30 days after petitioner received such a notice and accordingly it was error to dismiss her claim as untimely.

A person who claims to have been injured by a discriminatory housing practice may file an administrative complaint with the Secretary of Housing and Urban Development ("HUD") within one hundred and eighty days after the alleged incident. 42 U.S.C. § 3610(a) and (b). Dr. Houston's administrative complaint, filed on October 6, 1977 as to alleged discriminatory incidents on Septem-

ber 25 through 30, 1977, was timely. The issue presented by this petition is whether the subsequent filing of the civil action on June 6, 1978 is timely, or whether it contravenes the time limitations in § 3610(d).

Section 3610(d) provides in pertinent part:

> If within thirty days after a complaint is filed with the Secretary . . ., the Secretary has been unable to obtain voluntary compliance with this subchapter, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this subchapter, insofar as such rights relate to the subject of the complaint . . . (Emphasis added).

Defendant maintains that the above underscored period runs from the thirty-first to the sixtieth day after the filing of the administrative complaint. Plaintiff maintains that, although suit may be brought on the thirty-first day after the filing of the administrative complaint, the thirty day period does not begin to run until HUD deter-

mines and then notifies the complainant that voluntary compliance cannot be obtained. Plaintiff received such notice from HUD on May 9, 1978 and filed this suit within thirty days thereafter, though well past sixty days after the filing of the administrative complaint.

This Court noted but specifically declined to resolve this issue in Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 103, n.10 (1979). The lower federal courts are divided over the issue of which interpretation is correct. Several hold with plaintiff that the thirty days begins with receipt of HUD's notice of failure to conciliate. Taylor v. Fletcher Properties, Civil Action No. 74-M-850 (S.D. Tex., Sept. 18, 1975) (unreported opinion); Logan v. Richard E. Carmack & Assoc., 368 F.Supp. 121 (E.D. Tenn. 1973); Brown v. Ballas, 331 F.Supp. 1033 (N.D. Tex. 1971). Others have held the period begins on the thirty-first day after the filing of the administrative complaint. Green v. Ten Eyck, 572 F.2d 1233 (8th Cir. 1978); Kreiger v. Merifield Acres, Inc., 465 F.Supp. 62 (E.D. Vir. 1979), reversed on other grounds, Civ. Act. No. 79-1193

(4th Cir. 1980) (unreported opinion); Morgan v. Parcener's Ltd., 493 F.Supp. 180 (W.D. Ok. 1978); Goodman v. Platt, 444 F.Supp. 140 (N.D. Okla. 1978); Tatum v. Myrick, 425 F.Supp. 809 (M.D. Fla. 1977); Sumlin v. Brown, 420 F.Supp. 78 (N.D. Fla. 1976); Brown v. Blake & Bane, Inc., 402 F.Supp. 620 (E.D. Va. 1975); Young v. AAA Realty Co., 350 F.Supp. 1382 (M.D.N.C. 1972).

The language of the statute itself is ambiguous. The term "thereafter" needs the referent of a date certain mentioned earlier in the sentence. But there is no date certain mentioned. Instead, two separate time frames are discussed, the period of thirty days after the filing of a complaint and the Secretary's inability to obtain voluntary compliance. The statute leaves unclear which of these possible referents is the basis for fixing the date "thereafter" which the thirty days begins to run. In such a situation, where the relevant statutory language is unclear and susceptible of differing interpretations this Court has held that "the sound principle of according deference to administrative practices normally applies." Shea v. Vialpando, 416 U.S 251, 262 n.11 (1974).

HUD regulations interpret the limitation to commence from the date of receipt by a plaintiff of notice from HUD that conciliation efforts have failed. 24 C.F.R. §105.34 (1980) provides:

> the person aggrieved shall be notified in writing by registered or certified mail when the Assistant Secretary has determined that he is unable to obtain voluntary compliance through informal methods of conference, conciliation, or persuasion. The 30 days provided in Section 810(a) of Title VIII within which a civil action may be commenced shall be deemed to begin upon the receipt of such notice.

See also 24 C.F.R. §105.16(a). Statutory interpretation by the administrative agency charged with carrying out the mandate of the statute, while not dispositive, is entitled to "great weight." Brennan v. Occupational Safety and Health Administration, 513 F.2d 533 (10th Cir. 1975); Sims v. United States, 252 F.2d 434 (4th Cir. 1958), aff'd, 359 U.S. 108 (1959). This Court has consistently shown considerable deference to the construction given to Title VIII by HUD, "the federal agency primarily assigned to implement and administer Title VIII." Gladstone,

supra, 441 U.S. at 107; Trafficante v. Metropolitan Life Insurance Co., supra, 409 U.S. at 210.

Resolution of the issue is of great practical importance because the vast majority of administrative complaints filed with HUD are not conciliated or otherwise resolved within sixty days, the final limit for bringing a civil action under defendants' interpretation of the statute.[29/] Therefore, complainants who rely on a reasonable interpretation such as plaintiff's (which is, as discussed below, also HUD's interpretation) are being unexpectedly deprived of any remedy against illegal discrimination in many jurisdictions.

In conformance with the federal agency regulation, the regional office of HUD sent Dr. Houston a letter dated May 9, 1978 which stated, inter alia: [30/]

29/ See U.S. General Accounting Office, Stronger Enforcement needed to Uphold Fair Housing Laws: A Report to Congress by the Comptroller General 23 (1978) (Noting that on the average HUD does not even begin an investigation until anywhere from 58 to 92 days after a complaint is received).

30/ The entire text of the letter is set forth in the Appendix to the Petition at page 40a.

> . . . although we have attempted to seek a resolution of your complaint, we have not been able to achieve a satisfactory result . . . .
>
> As of the date you receive this letter, you are now free to seek court relief under Section 810 of the Federal Fair Housing Law provided you bring such action within thirty (30) days of this date.

Dr. Houston relied upon this letter and filed suit in federal court within thirty days of its receipt. The dismissal of her Title VIII cause of action is plainly inconsistent with the federal agency's regulations and written advice to plaintiff.[31/] The need to resolve this inconsis-

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31/ This issue was presented to the court of appeals which expressly declined to address it. (App. p. 1a-5a). Although the district court did not dismiss §3610 in its memorandum opinion dismissing the Title VIII claim, the issue of §3610 was raised in plaintiffs' Opposition to Motion to Dismiss, dated August 2, 1978, and the complaint alleged that plaintiff had filed a timely charge with HUD and had received notice of her right to sue from HUD pursuant to §3610 on or about May 12, 1978, which was less than 30 days prior to the filing of suit.

tency is apparent. Until the issue is settled authoritatively, a party who relies in good faith upon the published regulations and mailed instructions of the administrative agency may be barred from vindicating his or her rights in federal court.

The intent of the Fair Housing Act is to provide for fair housing. 42 U.S. §3601. To effectuate this intent, Congress relied heavily on HUD's ability to eliminate or correct discriminatory housing practices by informal methods of conference, conciliation, and persuasion. See 42 U.S.C. §§3608, 3609, 3610. Only after the agency makes a decision to attempt resolution of the complaint does the conciliation process begin. If a complainant is then obligated to file suit immediately, HUD is foreclosed from having any meaningful opportunity to conciliate. The flexibility and informality of the conciliation process is necessarily disrupted by the institution of judicial action and conciliation must cease altogether if the suit comes to trial. §3610(f). In contrast, if the complainant is permitted to explore conciliation fully at the administrative

level without forfeiting the right to proceed to federal court should those efforts fail, needless lawsuits would not be filed and the likelihood of successful conciliation would be bolstered by respondents' desire to avoid defending formal court proceedings. The intent of Congress was to allow conciliation to run its full course. See 114 Cong. Rec. 9560 (1968) (remarks of Rep. Cellar, Chairman of the House Judiciary Committee: "If conciliation failed, or if the Secretary declined to resolve the charge or otherwise did not act within the 30 day-period, the aggrieved person would have 30 days in which to file a civil action," thus making clear that if the Secretary took any action to conciliate, that process should be allowed to run to completion before legal action was begun) (Emphasis added); 114 Cong. Rec. 9611 (1968) (remarks of Rep. Ford: "If the Secretary of HUD is unsuccessful," recourse is to the courts). Although HUD could conceivably continue its efforts in the pretrial stages of a civil action, 42 U.S.C. §§3610(f) and 3612(a), thus theoretically "squeezing the respondent at

both ends," as a practical matter conciliation would become an ineffectual sidelight.

In Gladstone, this Court noted some distinction in the statutory language between Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5 and 42 U.S.C. §3610(d). Specifically, §3610(d) does not explicitly require a complainant to give notification to HUD prior to filing a lawsuit while §706(f)(1) of Title VII requires receipt from the EEOC of a "right-to-sue" letter before proceeding to federal court. Yet the statute does require notice of whether or not the Secretary intends to resolve the complaint and HUD has, by regulation, obligated itself to send a right-to-sue letter upon the unsuccessful completion of the negotiation process. There is thus sufficiently similar language, history and procedure between Title VII and Title VIII to make it appropriate in both situations to allow the conciliation process to run its course. Logan v. Richard E. Carmack & Assoc., supra, 368 F.Supp. at 122; Schwemm, "Discriminatory Effect and The Fair Housing Act," 54 N.D.L. 199, 238 (1978) ("[n]one

of the differences between employment and housing justify a fundamental difference in the interpretation of the statutes.") As in the context of Title VII claims it is doubtful "that Congress intended to provide a judicial remedy [accorded such primary importance] which is so easily forfeited by those whose rights it vindicates." Coles v. Penny, 531 F.2d 609, 615 (D.C. Cir. 1976). In the face of an ambiguously worded statute and a HUD regulation in direct conflict with the result reached below, to continue to allow the conflict created by lower courts as to the proper interpretation of §3610(d) is to create a procedural "booby-trap"[32/] "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Love v. Pullman, 404 U.S. 522, 527 (1972).

32/ Cf. Bell v. Brown, 557 F.2d 849, 859 (1977) (Title VII).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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February 1981

Robin J. Stout, a third year student at Columbia University Law School assisted in the preparation of the petition.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

No. CIV-78-0571-T

FILED AUG. 29, 1978

ALICE V. HOUSTON,

Plaintiff,

v.

BENTTREE, LTD., an Oklahoma corporation; and JOHN KILPATRICK, as agent for said BENTTREE, LTD.,

Defendants.

O R D E R

Plaintiffs in this action is a black resident of Oklahoma City who claims that defendants have discriminated against her in the sale of housing, in contravention of 42 U.S.C. §§1981, 1982, and 3604. Jurisdiction over plaintiff's complaint is invoked under 28 U.S.C. §1343 and 42 U.S.C. §3612.

Defendants have moved to dismiss, alleging in their first brief on the motion that plaintiff's

action is barred by the 180-day limitation period imposed by 42 U.S.C. §3612. Defendant Kilpatrick asserts that plaintiff's complaint fails to state a claim upon which relief can be granted as against him. Addressing this contention first, the Court notes that plaintiff has had no opportunity to respond to this argument, as it was not specifically raised in the Motion to Dismiss and brief in support thereof, but was instead raised in defendants' reply to plaintiff's response brief. While the court could ignore this argument as having been improperly raised, it is preferable to dispense with the issue now, rather than delay the case for further briefing. The Court is satisfied that sufficient facts have been alleged against defendant Kilpatrick to state a claim upon which relief can be granted. Plaintiff has alleged that specific acts amounting to discrimination were undertaken by agents of defendants. Plaintiff has additionally alleged that defendant Kilpatrick was responsible for various dodges or evasionary schemes which prevented her agent from forming a contract with the defendant Benttree. 42 U.S.C. §3604(d) makes unlawful the representation to any person because

of race that any dwelling is not available for sale, when it is in fact for sale. Plaintiff's complaint, taking all facts pleaded therein and inferences to be drawn therefrom as true in favor of plaintiff, as is required on a Motion to Dismiss, alleges a violation of section 3604 against defendant Kilpatrick and will withstand a Motion to Dismiss for failure to state a claim.

Defendants' remaining ground for dismissal asserts that plaintiff's complaint is barred by plaintiff's failure to sue within 180 days of the Act of discrimination as required by section 3612, under which plaintiff's complaint is brought. The act of discrimination alleged by plaintiff occurred on September 28, 1977. The complaint was filed June 6, 1978, more than 180 days later. Plaintiffs cause of action founded upon section 3612 is thus barred. Hickman v. Fincher, 483 F.2d 855 (4th Cir. 1973). Plaintiff's attempt to secure administrative relief does not toll the 180-day limitation of section 3612. Jefferson v. Mentzell, 409 F.Supp. 1 (N.D. Tex. 1976).

Defendants' next argue that 28 U.S.C. §1343 is not an independent jurisdictional statute and,

without a remedy under section 3612, plaintiff's entire complaint must fail. Defendants' argument ignores plaintiff's allegations of a violation of 42 U.S.C. §§1981 and 1982. When a discriminatory practice is within both the Fair Housing Act and the Civil Rights Act of 1866, the 180-day limitation of section 3612 does not apply to the cause of action under the Civil Rights Act.. Meyers v. Penny Pack Woods Home Ownership Assn., 559 F.2d 894 (3rd Cir. 1977); Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir. 1975), cert. denied 423 U.S. 855; Hickman v. Fincher, supra; see also 42 U.S.C. §3615; Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969). As there is no statute of limitations provided in the Civil Rights Act of 1866, the court must look to the comparable state statute of limitations. Johnson v. Railway Express Agency Inc., 421 U.S. 454 (1975). This action was filed less than one year after the alleged act of discrimination, and is well within Oklahoma statutory limitations period.

For the reasons discussed above, the defendants' motion should be sustained as to plain-

tiff's section 3612 cause of action, but the section 1981 and 1982 causes of action will not be dismissed.

It is so ordered this 26th day of August, 1978.

/s/ RALPH G. THOMPSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

No. CIV-78-0571-T

FILED MAR. 16, 1979

ALICE V. HOUSTON,

Plaintiff,

v.

BENTTREE, LTD., an Oklahoma corporation, and JOHN KILPATRICK, as agent for said BENTTREE, LTD.,

Defendants.

MEMORANDUM OPINION

This case came on to be tried to the Court, without a jury, on February 27, 1979, plaintiff appearing personally and with counsel, John Walker of Little Rock, Arkansas; defendant Benttree, Ltd. (Benttree) appearing through its vice president, Chris Calhoun, and counsel, Kent Frates.[1/] The

1/ John Kilpatrick was dismissed as a defendant prior to trial.

Court, having considered the testimony of witnesses, exhibits, and briefs and arguments of the parties, enters the following opinion, which shall constitute its findings of fact and conclusions of law.

Plaintiff, Alice Houston, a black female, moved to Oklahoma City in August of 1977, to assume the position of Director of Curriculum Services for the Oklahoma City Public Schools. Plaintiff holds a Ph.D. and her income during the relevant period was in excess of $36,000 yearly. Plaintiff desired to obtain housing commensurate with her education, income, and position. On September 25, 1977, while driving down May Avenue in Oklahoma City, plaintiff noticed a sign bearing the name of Benttree Condominiums, as "for sale" starting at a specified price. Plaintiff called her realtor who telephoned Chris Calhoun, vice president of Benttree and manager of the condominium project, to arrange an appointment to see the units. On September 26, 1977, plaintiff and her realtor, Ms. Tillman, were shown around the project by Carol Calhoun, sister-in-law of Chris Calhoun and one of several employees of another of Calhoun's businesses who were showing

the condominiums. Several of the units were completed and furnished and were used as models. The remainder were in various stages of construction. Plaintiff and Ms. Tillman and Ms. Calhoun discussed the project and looked at several units. Plaintiff found a two bedroom unit which she wanted to purchase, so stating to Ms. Calhoun. Plaintiff and her realtor were told by Ms. Calhoun that contracts for the purchase of the condominiums were being prepared by Benttree's lawyer and that the specially prepared contract was the only one which could be used. Contracts were not available at that time, but Ms. Calhoun stated that she would arrange a meeting with plaintiff and her realtor and the lawyer who was preparing the contracts, F. Smith Barnes, for the following day. The September 26 meeting between plaintiff, her realtor, and Ms. Calhoun was cordial, and when plaintiff and her realtor left the project, both they and Ms. Calhoun fully expected that plaintiff would eventually purchase a unit.

The following day, September 27, Ms. Calhoun advised Ms. Tillman that no real estate commission would be paid. The appointment with Mr. Barnes was postponed to the following day.

Plaintiff and Ms. Tillman met with Mr. Barnes on September 28, 1977. Mr. Barnes explained that the contract was not ready but would be soon. During the discussion, plaintiff expressed a desire to see a small three bedroom unit, instead of the two bedroom she had previously selected, and Mr. Barnes called Chris Calhoun and arranged for plaintiff to meet Calhoun at the project. Plaintiff and Ms. Tillman went to Benttree, and spoke to Chris Calhoun, who showed them the project and several units. Plaintiff found a small three bedroom she desired to purchase and so stated to Calhoun. He told her she would have to wait for the contracts which were being prepared. Plaintiff and Ms. Tillman testified that Calhoun was openly antagonistic at this meeting and that he asked them to leave.

The next two days, September 29 and 30, Ms. Tillman telephoned Mr. Barnes to see if the contracts were ready. She was told that they were not. No contact was made by either plaintiff or her realtor after September 30, and instead of visiting the open house on October 2 and using the form of contract being required, plaintiff filed a discrimination complaint against Benttree with HUD.

The Bettree condominiums were not, in fact, available for purchase until October 2, 1977, the day of a scheduled "opening", of which plaintiff was aware. Mr. Barnes completed the contracts on the afternoon of September 30. Barnes was involved in a lawsuit concerning an unrelated condominium project and wanted to make certain that Benttree did not encounter the same problems with its contracts. Until September 30, Mr. Barnes intended to draft a contract which would be binding on all parties, rather than the option contract which was ultimately used. Barnes finally prepared the simpler, option contract, to which he was orginally opposed, at the insistence of Chris Calhoun, who wanted some form of contract available for the October 2 opening.

Plaintiff knew of the opening scheduled for October 2, and knew that the units would be available for sale on that date. Ms. Calhoun told Ms. Tillman, and plaintiff was aware, that the units would not be available for sale until the weekend of October 2. Both Carol Calhoun and Mr. Barnes told plaintiff she could buy a unit as soon as the contracts were ready.

No units were purchased at Benttree until after October 2. Another prospective purchaser, Karen Duncum, a white female, who attempted to purchase a unit prior to October 2, was also told that only the approved form of contract would be accepted. Ms. Duncum and her realtor were very persistent in their efforts to purchase a unit, but were unable to do so prior to October 2, for the same reason plaintiff was unable to purchase, i.e, the completion and availability of the prescribed contracts by Barnes. No units were occupied until well after October 2, 1977. There-have been no black purchasers or residents at Benttree. Ms. Calhoun testified that two units were "held" prior to October 2, one for herself and one for a Mr. Horowitz. There is no evidence as to how these holding commitments were entered into or the effect of the failure of a prospective buyer to submit the approved contract after October 2. Absent any evidence on these points, the Court assumes, from the entirety of the remaining evidence, that these "holding commitments" were informal only, and would have been meaningless had the prospective purchasers

failed to submit an approved form of contract on or after October 2.

This suit was brought under 42 U.S.C. §§1981, 1982, and 3612. The Court previously sustained defendants' Motion to Dismiss plaintiff's cause of action based on 42 U.S.C. §3612 for failure to comply with the time requirements of that section. The Court has jurisdiction over plaintiff's cause of action against the corporate defendant pursuant to 42 U.S.C. §1981, 1982; 28 U.S.C. §1343.

The elements of plaintiff's proof to make out a prima facie case under 42 U.S.C. §§1981 and 1982 are (1) that the owner placed the property on the open market for sale, (2) that plaintiff was willing to purchase the property on the terms specified by the owner, (3) that plaintiff communicated this willingness to the owner at the time when the property was available for sale, (4) that the owner refused to sell the property to plaintiff on the terms which the owner indicated would otherwise be satisfactory, and (5) that there is no apparent reason for the refusal of the defendant to sell the property to plaintiff other than plaintiff's race. Duckett v. Silverman, 568

F.2d 1020 (2nd Cir. 1978); Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969).

Plaintiff failed to prove that the units were available for sale at the time her offer was made. This is fatal to plaintiff's right to relief. Until October 2, or perhaps, at the earliest, the afternoon of September 30, when the contracts were finally made available to Chris Calhoun by his lawyer, the Benttree condominiums were not available for sale to plaintiff or anyone else. The evidence shows that the unavailability of the contracts prevented anyone from purchasing a unit, not just the plaintiff. Although the sign which went up on or about September 25, 1977, advertised the condominiums to be "for sale", anyone inquiring, including plaintiff, was told that no sale could be made until the contracts were ready.

There is considerable evidence in the record which appears to be an attempt by plaintiff to show that the special contract requirement was a subterfuge on the part of defendant. Plaintiff showed that the contracts which were ultimately used were simple, took the lawyer only one hour to draft, and were not substantially different from those regularly used in the Oklahoma City area.

However, Mr. Barnes testified at length concerning the reasons for the delay in preparation and why he believed the option contract to be unsatisfactory, and it was not unreasonable for Calhoun to rely on the advice of his lawyer. Moreover, everyone who sought to purchase or make an offer without the required form of contract was treated uniformly, regardless of race.

There is additional evidence in the record tending to establish that the Benttree project was inexpertly managed and did not follow established business procedures. However convincing such evidence may be, it does not support plaintiff's right to relief. There is no requirement that defendant aggressively seek or pursue minority buyers. Nor is there any requirement that defendant conduct its business prudently or use licensed realtors. Absent evidence that defendant refused to sell to plaintiff on account of her race, and finding the evidence offered by plaintiff tending to show poor business judgment leads to no inference that defendant refused to sell to plaintiff on account of her race, the Court concludes that such evidence is irrelevant.

Under the standards announced in Bush v. Kaim, supra, defendants are entitled to judgment. Plaintiff did not prove that the property in question was on the open market for sale. Nor did plaintiff prove that she was willing to purchase the property on the terms specified by the owner. No terms were in existence until after plaintff's last contact with defendant. Had plaintiff been willing to comply with defendant's terms, she would have inquired on or after October 2, when she knew the units would be available and the contracts containing the terms would be ready. The requirement of the contracts were reasonable and all applicants were treated uniformly regarding the contract requirement. The Court therefore concludes that defendant did not refuse to sell to plaintiff on account of her race and judgment shall therefore enter for defendant.

Both parties have requested costs and attorney's fees, including John Kilpatrick, the defendant who was previously dismissed from the action, under 42 U.S.C. §1988, as amended. This section provides that the Court, in its discretion, may allow the prevailing party "... a rea-

sonable attorney's fee as part of the costs." Although defendant prevails in this case, the Court finds good faith on the part of plaintiff, and reasonable grounds for her belief that prompted this cause of action. Therefore the parties shall each bear their own costs, including attorney's fees.

It is so ordered this 16th day of March, 1979.

/s/ RALPH G. THOMPSON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 79-1366

FILED DEC. 02, 1080

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ALICE V. HOUSTON,

Plaintiff-Appellant,

v.

BENTTREE, LTD., an
Oklahoma corporation,

Defendant-Appellee.

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On Appeal From The United States District
Court For The Western District Of Oklahoma
(D.C. No. Civil 78-0571-T)

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John W. Walker of John W. Walker, P.A., Little Rock, Arkansas (David E. Parker, Jr. of John W. Walker, P.A., and Matthew T. Horan, Fayettesville, Arkansas, with him on the brief), for Appellant.

Kent F. Frates, of Ellis & Frates, Oklahoma City, Oklahoma, for Appellee.

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Before SETH, Chief Judge, LOGAN, Circuit Judge, and BOHANON, District Judge*.

SETH, Chief Judge

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The plaintiff brought this action under the Fair Housing Act and the Civil Rights Act, 42 U.S.C. §§ 1981 and 1982. The trial court dismissed the Fair Housing Act claim as untimely filed. The court heard the evidence on the remaining claim, held that plaintiff had not made a prima facie case of discrimination, and entered judgment for the remaining defendant. The plaintiff has taken this appeal and urges that the trial court's findings are not supported by substantial evidence, and that incorrect legal standards were applied. The individual defendant was dismissed at trial. The corporation will be referred to as the defendant.

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*Of the United States District Court for the Eastern, Northern and Western Districts of Oklahoma, sitting by designation.

The plaintiff is a black person who had come to Oklahoma City to assume an important position with the School System. She was looking for a suitable place to live and saw a "for sale" sign at the defendant's condominiums. She contacted a real estate agent to assist her in looking at the property.

The agent told plaintiff, about September 26, that the condominums would not go on sale until October 1 or 2 at which time the defendant was to have an "open house" on the property. However, the defendant was showing the finished units to prospective buyers. Plaintiff was shown the property on September 26, and she expressed interest in purchasing a two-bedroom unit. Defendant's sales agent told her that the one in which she was interested had already been sold. Plaintiff looked at another unit and stated she would buy it. The sales agent explained that the contracts were not yet ready and that the company would only use contracts prepared by its own attorney. An appointment was made to see the lawyer. At this point plaintiff fully expected that she would be sold a unit.

On September 28, plaintiff and her agent met with the attorney for defendant who also stated the contracts were not ready and that an option to buy would not be extended to plaintiff as the company insisted that the contract it prepared be used. Plaintiff then asked if she could see a three-bedroom apartment. The lawyer arranged an appointment for her with Mr. Calhoun, Vice President of Benttree. Plaintiff understood that the contract forms would be ready in a few days. She was shown a unit by Mr. Calhoun. Plaintiff and her agent both testified that Mr. Calhoun was antagonistic and rude. Mr. Calhoun testified that he told plaintiff at this showing that she could sign a contract at the open house on October 2. Plaintiff's agent phoned the attorney several times after their meeting seeking to obtain the contract forms but was not successful. On the afternoon of September 30, the attorney completed the contracts.

Plaintiff felt that she was badly and rudely treated by defendant's agents. She understood that Benttree refused to allow her to make a binding offer because of her race. Plaintiff thus alleged that defendant's excuse regarding the

contracts was merely a sham. Also, she had been told that one unit had been sold and nevertheless she could not then buy one.

The open house did take place on October 2, but plaintiff did not make an offer nor tender a deposit on or after that date. Plaintiff filed a complaint with the Department of Housing and Urban Development on October 6, 1977.

Upon these facts, the district court held that plaintiff had not established a prima facie case of discrimination. The unit which Benttree's agent thought had been sold before October 2 had not been sold although it may have been informally reserved for a prospective purchaser. The court concluded as to this that such non-binding reservation was of no significance and there was no showing that there would not have to be the usual binding option after October 2 on this also. The lawyer testified as to his preparation of the sale contracts and the business reasons necessitating the delay. The record shows that all prospective buyers were treated the same way. Thus if they wanted to make an offer before October 2, they were told that the contracts were not yet available. The court found as a fact that the

units were not placed on the market until October 2. The court also found that plaintiff was aware of this fact.

The elements of a prima facie case under 42 U.S.C. §§ 1981 and 1982 are: that the owner placed the property on the open market for sale; that plaintiff was willing and able to buy the property on the terms specified by the owner; that plaintiff so advised the owner at the time the property was available for sale; that the owner refused to so sell the property to plaintiffs; and that there is no apparent reason for the refusal of the defendant to sell the property to plaintiff other than plaintiff's race. Duckett v. Silberman, 568 F.2d 1020 (2d Cir.); Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio).

The record demonstrates that plaintiff did not prove several essential elements necessary to make a prima facie case. The findings of the trial court are supported by substantial evidence, and the correct legal standards were applied.

Appellant urges also that the district court erred in dismissing her cause of action under the Fair Housing Act. As we are convinced that

the trial record supports the trial court's finding that there was no discrimination, we need not consider this argument. We have considered appellant's other arguments and find them to be without merit.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 79-1366

(D.C. No. 78-0571-T)

NOVEMBER TERM - DECEMBER 2, 1980

==========

ALICE V. HOUSTON,

Plaintiff-Appellant,

v.

BENTTREE, LTD., an
Oklahoma corporation,

Defendant-Appellee.

==========

J U D G M E N T

==========

Before the Honorable Oliver Seth, Chief Circuit Judge, The Honorable James K. Logan, Circuit Judge, and The Honorable Luther L. Bohanon, United States District Court Judge

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ HOWARD K. PHILLIPS, Clerk
HOWARD K. PHILLIPS, Clerk

EXHIBIT ATTACHED TO
COMPLAINT

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
REGIONAL OFFICE
1100 Commerce Street
DALLAS, TEXAS 75202

May 9, 1978

REGION VI

IN REPLY REFER TO:

6EC
PHONE:214-749-7461
06-78-10-016-200

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Ms. Alice V. Houston
1601 N.W. 30th, #110
Oklahoma City, Oklahoma 73118

Dear Ms. Houston:

This letter is to tell you that although we have attempted to seek a resolution of your complaint, we have not been able to achieve a satisfactory result. We are now terminating our efforts at informal resolution of your complaint.

As of the date you receive this letter, you are free to seek court relief under Section 810 of the Federal fair housing law provided you bring such action within thirty (30) days of this date. As we indicated to you previously, you may also

have a right to bring court action under Section 812 of the law within 180 days after the alleged discriminatory act occurred or under the Civil Rights Act of 1866 as interpreted by the United States Supreme Court in the case of Jones v. Mayer. Such action may be brought in an appropriate Federal, state, or local court.

The relief available under Section 812 is similar to that allowed under Section 810, but you should consult your attorney, if you have one, to determine what course of action you should take. If you do not have an attorney or cannot pay for one, you will be interested to know that the court may appoint an attorney for you in an action under Section 812.

Sincerely,

s/s Leonard Chaires
LEONARD CHAIRES
ASSISTANT REGIONAL ADMINISTRATOR FOR
FAIR HOUSING and EQUAL OPPORTUNITY

cc: John W. Walker, Attorney

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Federal Statutes and Regulations

Title 42 U.S.C. § 1981 provides:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to know other.

R.S. § 19777. Derivation. Act May 31, 1870, c. 114, § 16, 16 Stat. 144.

Title 42 U.S.C. § 1982 provides:

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as

is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

R.S. § 1978. Derivation. Act Apr. 9, 1866, c. 31, § 1. 14 Stat. 27.

Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (Pub.L. 90-284, Title VIII, April 11, 1968, 82 Stat. 81), provides in pertinent part:

§ 3601. Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. Pub. L. 90-284, Title VIII, § 801, Apr. 11, 1968, 82 Stat. 81.

* * *

§ 3604. Discrimination in sale or rental of housing.

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful --

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

Pub.L. 90-284, Title VIII, § 804, Apr. 11, 1968, 82 Stat. 83; Pub.L. 93-383, Title VIII, § 808(b)(1), Aug. 22, 1974, 88 Stat. 729.

§ 3610. Enforcement

Person aggrieved; complaint; copy; investigation; informal proceedings; violations of secrecy; penalties

(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured

by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c) of this section, the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned. Any employee of

the Secretary who shall make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

Complaint; limitations; answers; amendments; verification

(b) A complaint under subsection (a) of this section shall be filed within one hundred and eighty days after the alleged discriminatory housing practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answers shall be verified.

* * *

Commencement of civil actions; State or local remedies available; jurisdiction and venue; findings; injunctions; appropriate affirmative orders

(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c) of this section, the Secretary has been unable to obtain voluntary compliance with this subchapter, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this subchapter, insofar as such rights relate to the subject of the complaint: Provided, That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter. Such actions may be brought without regard to the amount in contro-

versy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 3612 of this title, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

Burden of proof

(e) In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.

Trial of action; termination of voluntary compliance efforts

(f) Whenever an action filed by an individual, in either Federal or State court, pursuant to this section or section 3612 of this

title, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance.

Pub.L. 90-284, Title VIII, § 810, Apr. 11, 1968, 82 Stat. 85.

§ 3612. Enforcement by private persons

Civil action; Federal and State jurisdiction; complaint; limitations; continuance pending conciliation efforts; prior bona fide transactions unaffected by court orders

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: Provided, however, That the court shall continue such civil case brought pursuant to this section or section

3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: And provided, however, That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

Appointment of counsel and commencement of civil actions in Federal or State courts without payment of fees, costs, or security

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a

civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

Injunctive relief and damages; limitation; court costs; attorney fees

(c) the court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

Pub.L. 90-284, Title VIII § 812, Apr. 11, 1968, 82 Stat. 88.

Code of Federal regulations:

24 C.F.R. § 105.34 (1980) provides:

> The person aggrieved shall be notified in writing by registered or certified mail when the Assistant Secretary has determined that he is unable to obtain voluntary compliance through informal methods of conference, conciliation, or persuasion. The 30 days provided in section 810(d) of title VIII within which a civil action may be commenced shall be deemed to begin upon the receipt of such notice.